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No. 1023.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

A. J. PICKETT, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Duly Authorized Representative of JAMES FOSTER and Others,

Petitioner,

vs.

THE UNION TERMINAL COMPANY, a Corporation,

Respondent.

PETITION

Of A. J. Pickett for a Rehearing of Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

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Comes now A. J. Pickett, general chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, duly authorized representative of James Foster and others, petitioner in the above-entitled cause, and files this his petition for a

rehearing of his petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit; and for grounds therefor states:

I.

Since the filing of the petition for a writ of certiorari in this court on May 5, 1941, Senate Resolution No. 105 was enacted by the Senate of the United States on May 15, 1941 (87 Congressional Record [advance sheets] No. 91, page 4209). This resolution reads as follows:

> "Resolved, that the Administrator of the Wage and Hour Division of the United States Department of Labor, or his designated representatives, is hereby directed to undertake immediately an inquiry into the wages, hours and other conditions and practices of employment of redcaps by railroads or terminal companies in view of the minimum wage requirements of the Fair Labor Standards Act of 1938 (52 Stat. 1060), under his investigatory powers under said Act, and to ascertain and report to the Senate—
>
> "(1) The extent to which said conditions and practices violate the letter or the spirit of the Fair Labor Standards Act of 1938 or other federal statutes, if at all;
>
> "(2) The extent to which said conditions and practices are susceptible to regulation under the Fair Labor Standards Act in its present form; and
>
> "(3) What legislation, if any, should be enacted for the purpose of further regulating wages, hours or other conditions and practices of employment of redcaps under the Fair Labor Standards Act of 1938.
>
> "The Administrator shall give a full opportunity to both the employees and the employers to present publicly any evidence, information, data or argument they may care to present, and shall report such evidence and other data to the Senate with his findings and conclusions."

Your petitioner, having had no knowledge that this resolution was before the Senate, did not, of course, in his petition for certiorari or brief in support thereof urge this fact, or point out how this resolution made it not only highly desirable, but, in fact, imperative, that this Court authoritatively settle the questions involved herein, so that your petitioner must endeavor to do so in this petition for a rehearing.

The resolution, it will be noted, calls upon the Administrator of the Wage and Hour Division to ascertain and report to the Senate the extent to which the conditions and practices of employment of redcaps by railroads or terminal companies are susceptible to regulation under the Fair Labor Standards Act in its present form, and what legislation, if any, should be enacted for the purpose of further regulating wages, hours or other conditions and practices of employment of redcaps under the Fair Labor Standards Act. Now, it is apparent that in order for the Administrator to report to the Senate, and in order for the Senate to be informed of, the extent to which the conditions and practices of the employment of redcaps, and particularly the accounting and guarantee arrangement, and the inclusion of tips as wages, are susceptible to regulation under the Fair Labor Standards Act in its present form, it is necessary for the Administrator to know, and for the Senate to know, just what is to be the final construction placed upon the act by the courts—and there can be no final construction until this Court has spoken. While the resolution does not expressly refer to the accounting and guarantee plan adopted by the railroads, nor the question of whether tips may be included as wages, they, of course, as this Court knows, have been the real bones of contention in the relations between the redcaps and the railroads under the Fair Labor Standards Act, and the Administrator will be expected to inform the Senate in obedience to

the resolution the extent to which these "conditions and practices of employment of redcaps" may be regulated under the act in its present form, and "what legislation, if any, should be enacted for the purpose of further regulating * * * conditions and practices of employment of redcaps."

It is obvious that an expression by this Court on these vexing questions is absolutely essential before it may be determined whether the act in its present form as construed by the courts is sufficient, or whether it should be amended in order that its operation may result in benefiting those employees whom it was the intention of Congress to benefit, rather than making their condition worse. Your petitioner respectfully urges that this Court should lend its assistance to the Administrator of the act and to Congress by an authoritative construction of the act, so that Congress, being apprised of the construction of the language it used in the act, may intelligently change that language if its real intention was not correctly expressed thereby, or leave it stand in its present form if it was.

II.

Your petitioner feels that he perhaps did not stress sufficiently the importance of an authoritative interpretation of the language used in the Fair Labor Standards Act by this Court to the thousands of employees throughout the nation other than redcaps who receive tips, and to their employers. The great number of such employees was, through inadvertence of counsel for the petitioner, not brought to the Court's attention in the petition for certiorari, and hence your petitioner wishes to take the opportunity to do so in this petition for rehearing.

It is, of course, impossible to obtain any absolutely accurate figures as to the number of workers engaged in

occupations where tipping is prevalent, but in the issue of the Monthly Labor Review for December, 1937, published by the Bureau of Labor Statistics of the United States Department of Labor, Volume 45, No. 6, page 1305, it is said that the number so engaged during the year 1935, exclusive of bootblacks, was 869,674.

That the question of whether tips received by an employee should be included as part of the minimum wage prescribed by statute is one of great importance is evidenced by the following excerpt from a paper written by Mary A. Anderson, Director of the United States Women's Bureau, United States Department of Labor, entitled "Tips in Relation to Minimum Wages," and published in the March, 1941, issue of The American Labor Legislation Review:

> "Our second principle is that tips should not be counted as part of the legal minimum wage. For example, if $16 is established as the legal wage, the employer should not be permitted to pay the worker only the difference between the tips she receives and the minimum wage of $16. If the contrary policy were followed, the employee would be required to report to her employer the amount of tips received each week, in order that he in turn could know the amount of wages he must pay to make up the $16.
>
> "If this practice were followed the purpose of the minimum wage law would soon be defeated. It would not be long before employers discovered which of their employees are costing them the most money. Obviously, the girls who received the least in tips would have to be paid the highest wages to make up the $16. Gradually the girls receiving low tips would be dismissed, whether efficient or not, and those with ability to wile larger tips from an irresponsible public would be employed in their places. The workers would be no slower than the employers in discovering the effects of the reporting system on their welfare. The dismissal of one or two workers would

be sufficient to warn the others that if they were to retain their jobs their tips must equal those of their more fortunate coworkers. There is always one effective way out of a situation like this for a worker who is desperately in need of a job, and that is to report to her employer a greater amount of tips than she actually receives. The whole purpose of the minimum wage law, that of guaranteeing the worker a living wage, would be defeated if this practice were permitted and the State authorities would be almost helpless to correct the situation."

Your petitioner respectfully submits that the principle that tips should not be counted as part of the legal minimum wage, as Miss Anderson contends, has much to support it, and that Congress, by providing in Section 3 (m) of the Fair Labor Standards Act that the word "wage" should include certain things without mentioning tips, recognized this principle. This Court should, we believe, decide whether the language used by Congress sufficiently declared this principle, so that Congress may know whether an amendment of the act is necessary.

III.

This Court may have felt that certiorari should not have been granted in view of the apparent unanimity of the cases so far decided, all being decided against the redcaps. Your petitioner wishes to point out now, as perhaps he failed to do in his petition for certiorari and supporting brief, that there is actually a conflict between the decision of the Fifth Circuit Court of Appeals in this case and the decision of the District Court for the Western District of Missouri in the case of Harrison v. Kansas City Terminal Railway Company, 36 Fed. Supp. 434, the only other redcap case in which any opinion was written. We appreciate, of course, that the fact that a conflict appears

between a decision of a circuit court of appeals and a district court in another circuit is not in itself grounds for this Court issuing its writ of certiorari, but we believe such conflict may be considered with the fact that important questions of federal law which have not been, but should be, settled by this Court are involved. The Circuit Court of Appeals for the Fifth Circuit, in the case at bar held (118 F. [2d] 328) that the tips received by the redcaps were the property of the terminal company, so that no contract was necessary to make them the property of the company. Judge Otis, however, in the Kansas City Terminal Railway Company case, held (36 Fed. Supp. 434, l. c. 439) that "in the absence of an agreement upon the part of an employee to turn over his tips to his employer, tips received by the employee are the property of the employee," and that absent such an agreement, as he found there was, on the part of the redcaps, whereby they accepted the accounting and guarantee arrangement as part of their employment contract, they would have been entitled to recover, saying (l. c. 437):

> "I shall consider the question with three different assumptions. 1. I shall assume that arrangement between the defendant and the redcaps which was in existence before the enactment of the Fair Labor Standards Act and the coming into being of the Accounting and Guaranty Arrangement. 2. I shall assume a certain hypothetical arrangement touching the disposition of tips. 3. I shall assume the Accounting and Guaranty Arrangement entered into between the redcaps and defendant.
>
> Assumption No. 1.
>
> "(1, 2) It does not seem to me that any real problem is presented under Assumption No. 1. To say that, within the intention of Congress as expressed in the Fair Labor Standards Act, the defendant paid wages to redcaps when it permitted them to accept

tips from travelers is to assume that Congress did not know the generally accepted meaning of simple words. But they did know the generally accepted meaning of simple words. They knew what the word 'wages' means in common, present day understanding. They knew what a 'tip' is. Certainly any member of Congress would have been amazed if he had been told, when he handed to the bellboy in his Washington hotel a tip, that the hotel company was paying the bellboy his wages. If Congress had intended that tips should be included in the meaning of the word 'wages' it would have said so. It intended that the reasonable cost of board and lodging furnished by the employer should be included, and it said so. Sec. 203 (m). The conclusion is that if the simple situation here assumed were that presented in this case plaintiff undoubtedly would be entitled to prevail, at least to the extent of recovering the minimum wages required to be paid."

It is apparent that the decision of Judge Otis in the Kansas City case is in direct conflict with the decision of the Fifth Circuit Court of Appeals in this case, as Judge Otis clearly holds that, absent an agreement on the part of the redcaps to turn over their tips or that the tips shall be the property of their employer, the tips are the property of the redcaps, whereas the Fifth Circuit Court of Appeals holds that the tips are the property of the employer irrespective of any consent or agreement on the part of the redcaps.

Your petitioner respectfully submits that the great public importance of the questions involved herein may not have been sufficiently impressed upon the Court at the time it denied the petition for certiorari herein, and in view of the importance of these questions, not only to redcaps throughout the nation, but to others employed in tipping occupations, and in view of the evident great concern of Congress about the subject, this Court should issue its writ

of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit to the end that the law may be clarified and settled by a decision of this Court.

Respectfully submitted,

CHAS. M. HAY and
S. D. FLANAGAN,
Attorneys for Petitioner.

Certificate of Counsel.

Charles M. Hay and S. D. Flanagan, attorneys for the petitioner in the above-entitled cause, do hereby certify that the above and foregoing petition for a rehearing is presented in good faith and not for delay, and is believed by them to be meritorious.

CHARLES M. HAY,
S. D. FLANAGAN,
Attorneys for Petitioner.